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SENTENCE

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

14 CR 314 (RA)

5 RENE CARDONA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 August 20, 2015
11:35 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 GINA MARIE CASTELLANO

ANDREW DeFILIPPIS

18 Assistant United States Attorneys

19 DANIEL DeMARIA

CARLOS MORENO

20 Attorneys for Defendant

21 ALSO PRESENT: AARON SPIVACK, FBI

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1 THE DEPUTY CLERK: In the matter of United States of
2 America versus Cardona, Docket No. 14 CR 314.

3 Counsel, please state your names for the record.

4 MS. CASTELLANO: Good morning, your Honor. Gina
5 Castellano and Andrew DeFilippis, for the government. We're
6 joined by Special Agent Aaron Spivack, of the FBI.

7 THE COURT: Good morning.

8 MR. DeFILIPPIS: Good morning.

9 MR. DeMARIA: Good morning, your Honor. Daniel
10 DeMaria and Carlos Moreno, for Rene Cardona, who's present.

11 THE COURT: Good morning.

12 Good morning to you, Mr. Cardona.

13 THE DEFENDANT: Good morning.

14 THE COURT: This matter is on for sentencing in United
15 States versus Rene Cardona.

16 Following a bench trial on a April 9th, 2015, the
17 defendant was found guilty of five counts, of charges involving
18 child pornography, including inducing an 11-year-old boy to
19 send sexually explicit photographs of himself over the
20 Internet, and engaging in sexually explicit conduct with a
21 14-year-old boy, producing a video recording of such conduct,
22 and sending that video over the Internet.

23 In connection with today's proceeding, I reviewed the
24 following submissions: The presentence investigation report,
25 dated July 8, 2015, including the recommendation and addendum;

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1 the defendant's sentencing memorandum, dated July 27th, with
2 accompanying exhibits; the government's sentencing memorandum,
3 dated August 3rd, 2015, with accompanying exhibits; the seven
4 impact victim impact statements submitted by the government
5 under letters dated August 5th and August 13th; and I have also
6 received letters from the defendant and the government dated
7 August 13th and 17th regarding whether a 15-year mandatory
8 sentence violates the Eighth Amendment.

9 Have the parties received each of these submissions?

10 MS. CASTELLANO: Yes, your Honor.

11 MR. DeMARIA: Yes, your Honor.

12 THE COURT: Am I missing anything? Is that
13 everything?

14 MS. CASTELLANO: It's everything, your Honor.

15 THE COURT: And have each of these submissions been
16 filed on ECF, even in redacted form?

17 I understand that, Mr. DeMaria, some of your
18 submissions were filed in redacted form; is that correct?

19 MR. DeMARIA: Yes, your Honor. Dr. Krueger's report
20 was filed under seal and the reference letters filed on ECF do
21 not contain the addresses, so full copies were filed under seal
22 as well.

23 THE COURT: All right, thank you.

24 MS. CASTELLANO: Your Honor, the letters from the
25 government which include the victim impact statements, have not

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1 been filed on ECF.

2 THE COURT: And that's fine as well. I think we
3 should, though, file them under seal so that they're part of
4 the record for appeal. Okay?

5 MS. CASTELLANO: Understood, sure, your Honor.

6 THE COURT: Thank you.

7 So let's begin by discussing the presentence report.

8 Mr. DeMaria, have you read the presentence report and
9 discussed it with your client?

10 MR. DeMARIA: At length, your Honor.

11 THE COURT: Thank you.

12 Mr. Cardona, have you read the presentence report and
13 had an opportunity to discuss it with your attorney?

14 THE DEFENDANT: Yes, your Honor?

15 THE COURT: Mr. DeMaria, do you have any objections to
16 the report?

17 MR. DeMARIA: No, your Honor.

18 THE COURT: Does the government have any objections?

19 MS. CASTELLANO: Your Honor, no objections. I just
20 note that in the mandatory conditions section of the PSR, I've
21 spoken with the probation officer, and the condition that the
22 defendant register was inadvertently left out. I have the
23 language that probation usually includes. I'm happy to read
24 that out loud.

25 THE COURT: Could you please.

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1 MS. CASTELLANO: "The defendant shall register with
2 the state sex offender registration agency in any state where
3 the defendant resides, is employed, carries on a vocation, or
4 is a student, and shall provide proof of registration to the
5 probation officer."

6 THE COURT: All right, thank you. It doesn't affect
7 the factual findings, so I don't think that we need to modify
8 the report itself but remind me when we get to that. Okay?

9 MS. CASTELLANO: Yes, your Honor.

10 THE COURT: So the presentence report, the Court
11 adopts the factual findings in the report. The presentence
12 report will be made a part of the record in this matter and
13 placed under seal. If an appeal is taken, counsel on appeal
14 may have access to the sealed report without further
15 application to the Court.

16 So next we're going to talk with the sentencing
17 guidelines.

18 Mr. Cardona, as I'm sure you're aware, and for those
19 of you who are here today -- the United States Sentencing
20 Guidelines are a set of rules that are published by the
21 Sentencing Commission in order to guide judges as they impose
22 sentences. And although at one time they were mandatory,
23 meaning that judges were required to follow them, unlike the
24 mandatory minimum sentences that apply in this case, the
25 sentencing guidelines are no longer binding on judges but

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1 judges must nonetheless consider them in determining what an
2 appropriate sentence is, and so that's what we're going to do
3 now.

4 Do the parties agree that the defendant is facing a
5 mandatory sentence of 15 years and a guidelines range of 292 to
6 365 months?

7 MS. CASTELLANO: Yes, your Honor.

8 MR. DeMARIA: Yes, your Honor.

9 THE COURT: One issue I just want to touch on briefly
10 is acceptance of responsibility. I do think that the defendant
11 has accepted responsibility for his conduct but I will note, as
12 I did at the suppression hearing, that I don't think he was
13 entirely forthcoming with the Court. Nonetheless, the
14 government is not contesting acceptance points, is not seeking
15 obstruction points, and so I'm not going to press that issue
16 further, but I did just want to note that.

17 In any event, based on the parties' agreement and my
18 independent evaluation of the sentencing guidelines, I accept
19 the guidelines calculation in the presentence report and I find
20 that the defendant's offense level is 40, his criminal history
21 category is I, and his recommended guideline sentence is 292 to
22 365 months in prison, and, as I stated, there is also a 15-year
23 mandatory minimum sentence.

24 Now, as I said a moment ago, the guideline sentence is
25 only advisory; courts may impose a sentence outside of that

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1 range based on one of two legal concepts, a departure or
2 variance. A departure allows for a sentence outside the
3 advisory range based on some provision of the guidelines.

4 Am I correct that neither side is seeking a departure,
5 as opposed to a variance, which the defendant is seeking under
6 3553(a)? Is that correct?

7 MS. CASTELLANO: Yes, from the government, your Honor.

8 MR. DeMARIA: Yes, your Honor.

9 THE COURT: All right.

10 So, nevertheless, I have considered whether there is
11 an appropriate basis for departure from the advisory range
12 within the guideline system, and while recognizing that I have
13 the authority to depart, I don't find grounds warranting a
14 departure under the guidelines.

15 I do, though, as I noted, also have the power to
16 impose a nonguideline sentence based on what we call a variance
17 and in light of the factors set forth in the provision of the
18 law 18, United States Code, Section 3553(a). And I am happy to
19 hear the parties out with respect to the appropriateness of
20 that.

21 Does the government wish to be heard with respect to
22 sentencing?

23 MS. CASTELLANO: Just very briefly, your Honor.

24 The defendant's conduct in this case is extremely
25 serious, and it is the government's position that the

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1 guidelines range appropriately affects the seriousness of the
2 conduct.

3 The defendant possessed hundreds of images of child
4 pornography. He induced the production of child pornography
5 from victim 1 over Instagram. He sexually abused victim 2, and
6 he videotaped himself doing it. And he distributed an image of
7 victim 2 over the Internet. He did all of this while he was
8 HIV positive and working and subsequently volunteering at an
9 afterschool program. The defendant as hundreds of victims,
10 some of whom the Court has now heard from through the victim
11 impact statements.

12 The children who were depicted in those images that he
13 possessed are real victims. Victim 1 was an 11-year-old boy at
14 the time; victim 2 was a 14-year-old boy at the time. The harm
15 that this defendant has imposed on his victims is unimaginable.

16 For those reasons, your Honor, the government's
17 position is that a sentence within the sentencing guideline
18 range is appropriate in this case.

19 THE COURT: I just have a few questions.

20 According to the complaint, at the time of his arrest,
21 the defendant stated that in the course of working at the
22 afterschool program he had inappropriate contact with several
23 children. Were you able to identify any of the children that
24 he had physical contact with, other than the 14-year-old?

25 MS. CASTELLANO: May I have one moment, your Honor?

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1 THE COURT: Sure.

2 (Pause)

3 MS. CASTELLANO: The FBI was able to identify those
4 children and contact has been made and the children were
5 interviewed, but those children did not want to participate in
6 the investigation.

7 THE COURT: I know that there is reference to two
8 others, I believe, in his statement, but have you identified
9 how many children he physically abused or had sexual contact
10 with since the time he was an adult?

11 MS. CASTELLANO: Can I just have a moment?

12 (Pause)

13 MS. CASTELLANO: Your Honor, my understanding is that
14 in addition to victim 2, the two children noted in the
15 defendant's statement, there were additional two children. But
16 I'll note that it's the government's current understanding that
17 it may not have been explicit sexual conduct but inappropriate
18 conduct nonetheless.

19 THE COURT: Two more questions:

20 Has he been charged with statutory rape or any other
21 charge in the state in connection with the abuse of the
22 14-year-old?

23 MS. CASTELLANO: I don't believe he has yet, your
24 Honor.

25 THE COURT: Do you know if anything has happened to

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1 the neighbor that Mr. Cardona alleges sexually abused him from
2 the time that he was 14 until shortly before this incident?
3 Has he been investigated? Has he been charged?

4 MS. CASTELLANO: The government has no information
5 right now on exactly who that individual is. We haven't been
6 able to identify that individual.

7 THE COURT: Are you contesting in any way the accuracy
8 of his statements to Dr. Krueger?

9 MS. CASTELLANO: Your Honor, we don't have any way to
10 verify this. The defendant hasn't provided any identifying
11 information so we just don't have a position on that.

12 THE COURT: All right. Do any victims wish to be
13 heard today? I've obviously read the victim impact statements.
14 Do any victims wish to be heard today?

15 MS. CASTELLANO: I don't believe that there are any
16 victims here, but perhaps the Court can ask.

17 THE COURT: Well, if anyone is here on behalf of a
18 victim -- and no one is raising their hand or indicating that
19 they are. I see a good number of other people in the courtroom
20 but they may be here to support Mr. Cardona.

21 All right, thank you.

22 MS. CASTELLANO: Your Honor, may I add one point on
23 that? The government, through the victim witness coordinator,
24 is in contact with certain of the victims and understands that
25 certain of the victims may make specific restitution requests.

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1 We haven't received those to date but believe that they may be
2 forthcoming in the next week or so. To the extent the
3 government receives those requests, we'll pass them on to the
4 Court.

5 THE COURT: Okay. And we'll talk about restitution a
6 little more at the end.

7 MS. CASTELLANO: Right.

8 THE COURT: Thank you.

9 Does defense counsel wish to be heard?

10 MR. DeMARIA: Yes, your Honor, and I will be a lot
11 more lengthy. If I may use the lectern?

12 THE COURT: Sure. Just speak loud and clear and speak
13 into the microphone, please --

14 MR. DeMARIA: Yes, your Honor.

15 THE COURT: -- and take your time.

16 MR. DeMARIA: Your Honor, Mr. Cardona has had a
17 challenging, often sad, life that has led him to contact which
18 he truly, truly regrets. His father died in prison, at the age
19 of six, his brother died of a drug overdose a few weeks before
20 his father died. He was the victim of severe bullying at
21 school, and that is only the tip of the iceberg.

22 At the age of 14, a trusted family friend and neighbor
23 got Mr. Cardona addicted to cocaine and used his addiction to
24 rape him repeatedly over the span of a number of years.

25 Mr. Cardona's actions that have led him before the

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1 Court will forever haunt him. All these people gathered, your
2 Honor, the vast majority of them, bear testament that deep down
3 Mr. Cardona is a good person who unfortunately, due to
4 loneliness, unchecked mental health issues, untreated drug
5 addiction and unaddressed unhealthy sexual urges, did very bad
6 things, which he truly, truly regrets. And the Court will hear
7 from him after I'm done and he will express that himself.

8 In a case like this, your Honor, it's very important
9 to recognize that Mr. Cardona made a full and candid disclosure
10 to Agent Spivak and the other FBI agents when he was
11 confronted. He didn't try to rationalize the conduct in any
12 way, he didn't try to minimize it; he accepted full
13 responsibility and gave a candid confession.

14 In that vein, your Honor, recent events at Penn State
15 at Poly Prep at Horace Mann show that when a school or church
16 is involved, a lot of victims come out of the woodwork. But in
17 this case no one has come out, not even people who Mr. Cardona
18 identified to the agents, which does go to show that he was
19 completely candid with the agents.

20 THE COURT: Well, this case didn't get the kind of
21 press that those cases did, right?

22 MR. DeMARIA: That's correct, but the FBI issued a
23 press release, the U.S. Attorney issued a press release, it was
24 in the New York Daily News, it was on some Facebook groups
25 relating to the center in the Bronx. So it did receive

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1 certainly nothing along the lines of those cases but it did
2 receive its fair share.

3 And, your Honor, the reason I mention acceptance of
4 responsibility -- and I will mention it a few more times -- is
5 that it goes a long way or it goes hand in hand with his
6 prognosis for rehabilitation.

7 Now, I think there is a direct correlation between
8 rehabilitation and acceptance of responsibility, and I want to
9 touch on a couple of points from the government's sentencing
10 memorandum. First, the government takes the position that
11 Mr. Cardona's suppression motion is somewhat of a factor in
12 terms of acceptance of responsibility. And that, your Honor,
13 is precisely why I quoted Judge Rakoff front and center in my
14 suppression brief, because he stated, sitting by designation on
15 the Second Circuit, that child pornography is so repulsive a
16 crime, that those entrusted to root it out may in their zeal be
17 tempted to bend or even break the rules, but if they do, they
18 endanger the freedom of all of us. And so I certainly don't
19 think the Court should take the suppression motion into
20 consideration.

21 The government also states, and the Court as well,
22 that Mr. Cardona was not entirely candid during the suppression
23 hearing. But, your Honor, respectfully, that overlooks the
24 reality that Mr. Cardona had barely slept the night before the
25 agents came. Agents flooded the apartment shortly before

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1 6:00 a.m. or at 6:00 a.m. Mr. Cardona was surely terrified, he
2 was surely disoriented. This was, without a doubt, a very
3 stressful situation, an unprecedented situation, and the fact
4 that he doesn't remember signing a certain paper at a certain
5 time or being advised of his rights, I would submit, simply
6 shows that the whole day was a blur for him, as opposed to any
7 attempt to mislead the Court.

8 THE COURT: But he didn't say it was a blur, from what
9 I recall. What I recall is, he specifically came up with a
10 story about a pen that didn't work, that we had never heard
11 anything about previously.

12 In any event, please go on.

13 MR. DeMARIA: Your Honor, in that sense, it is a moot
14 point, and you are correct, but I do think that the stress of
15 the event has affected his memory in that regard, as opposed to
16 a purposeful intent to lie or mislead the Court. And, again,
17 my point in all this, your Honor, is that the suppression
18 motion and his testimony should not be used in determining his
19 sentence.

20 Now, in terms of the offense itself, no one can deny
21 that he committed a very serious offense -- I don't deny it,
22 Mr. Cardona doesn't deny it -- but the Second Circuit in
23 Broxmeyer has instructed us that statutory maximums must be
24 reserved for the worst of the worst offenders; and the question
25 thus becomes how Mr. Cardona's crime compares to others. And

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1 I've drawn the Court's attention in my memorandum to about 20
2 or more cases where people charged with production received the
3 mandatory 15-year minimum. And I think most of those cases are
4 comparable or even worse than Mr. Cardona's.

5 In the Sierra Danyelle Halsey case, the defendant
6 produced child pornography involving oral sex on an infant and
7 a five-year-old as well. And in both those instances, she was
8 doing it for financial profit.

9 In the case of Nicholas William Soto, the defendant
10 made a video of a six-year-old performing oral sex on him.

11 In the case of Shane Sells, the defendant had
12 intercourse with a 15-year-old girl, recorded it, disseminated
13 it.

14 In the case of Dale Wray Fulford, the defendant had
15 intercourse with a seven-year-old and continued to have sex
16 with her for about seven years and took a number of sexually
17 explicit pictures. He was sentenced to 15 years.

18 In comparison to those cases, your Honor, I would
19 submit that Mr. Cardona's case is comparable or even not as
20 serious. The reason I say that is, his case did not involve
21 violence, it didn't involve sadomasochistic behavior, his crime
22 did not involve infants, it didn't involve prepubescent
23 children, he was not doing this for financial benefit. And I
24 want to make it clear that this is not to justify his conduct
25 in any way, shape or form but simply to demonstrate that people

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1 who have committed similar crimes have been sentenced to 15
2 years and, according to Broxmeyer, that is a factor deserving
3 of consideration.

4 Perhaps the biggest factor for consideration is the
5 risk of reoffending. In the government's memorandum, they
6 state that Dr. Krueger failed to perform any objective testing.
7 In fact, Dr. Krueger performed a number of recognized tests,
8 including the SONAR test, the LS/CMI assessment, the Static
9 99-R. They're all fully described in his report at page 10.
10 If that isn't objective testing, I simply don't know what is.

11 The government is also mistaken when it states that
12 the report was not written with Dr. Krueger having seen the
13 evidence in this case. In fact, on pages 1 and 2, Dr. Krueger
14 states he saw the complaint, he saw the indictment, and he saw
15 the Bates stamped documents, about a hundred pages' worth. And
16 I think this is a very important point. His report is very
17 important, both in terms of rehabilitation and the aspect of
18 sentencing pertaining to protection of the public.

19 So I note for the record that other than the child
20 pornography itself and the full Instagram transcripts,
21 Dr. Krueger basically reviewed all of the discovery in this
22 case. And, of course, he had portions of the Instagram
23 transcripts to review when he read the complaint and the
24 discovery which we provided Dr. Krueger with. And, again, he
25 states this in his report, that he reviewed Bates numbered

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1 pages CARDONA 25 to CARDONA 123. Those include detailed
2 descriptions of what occurred with victims 1 and 2.

3 Your Honor, with respect to a protection of the -- I'm
4 sorry, did you --

5 THE COURT: No, no, go ahead.

6 MR. DeMARIA: With respect to the protection of the
7 public aspect, I want to emphasize the fact that between sex
8 offender treatment, supervision, and sex offender registration,
9 they are all very effective or they can be very effective.
10 And, as noted in my sentencing memorandum, in the Eastern
11 District of New York, there has only been one known offender
12 convicted of a child pornography offense who committed a sexual
13 contact offense while under postrelease supervision. And, of
14 course, the Court could impose lifetime postrelease supervision
15 on Mr. Cardona. I had assumed in our district, I couldn't find
16 any studies but I don't see why there would be a big difference
17 than the Eastern District, where they have had remarkable
18 success.

19 Your Honor, I'd like to conclude by asking the Court
20 to maintain the perspective that this case is tragic, not just
21 as a result of the harms to victims 1 and 2 and to the victims
22 whose images exist on Mr. Cardona's computer and the child
23 pornography cyber world, but also due to the circumstances
24 Mr. Cardona's young life and the severe punishment that this
25 Court must impose. And I would submit the sentence of 15 years

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1 is adequate to justify the factors of 3553(a).

2 THE COURT: Thank you.

3 MR. DeMARIA: Thank you.

4 THE COURT: Mr. Cardona, is there anything you'd like
5 to say today?

6 THE DEFENDANT: Yes.

7 Should I stand?

8 THE COURT: Sure. Just speak into the microphone so I
9 can hear you, please.

10 THE DEFENDANT: Your Honor, I just want to say that
11 I'm very sorry to the victims, I'm sorry for all the pain that
12 I have caused them, I'm sorry for the pain that I've caused
13 their families, I'm sorry, I'm ashamed for what I've done. I
14 pray that God will give them peace somehow, especially after I
15 know how much this has impacted them. I wish I could take it
16 back. I'm so sorry.

17 I also want to say sorry to my family because I'm also
18 putting them through this terrible time, and I'm very sorry. I
19 wish I could take it back.

20 THE COURT: Thank you.

21 Is there any reason why sentence cannot be imposed at
22 this time?

23 MS. CASTELLANO: No, your Honor.

24 MR. DeMARIA: Yes, your Honor, as stated in our letter
25 of August 13th, we believe that the 15-year mandatory minimum

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1 from 18, U.S.C., 2251 violates the Eighth Amendment prohibition
2 against cruel and unusual punishment.

3 THE COURT: All right. I'm happy to rule on that and
4 I will rule on that argument shortly.

5 MR. DeMARIA: And that's our only objection, in that
6 regard.

7 THE COURT: I don't think there is a need to put off
8 this proceeding in light of Judge Weinstein's case but I am
9 ready to rule on that issue, so I'll do so shortly.

10 Under the law, I'm required to consider the advisory
11 guideline range of 292 to 365 months as well as various other
12 factors that are outlined in a provision of federal law, 18,
13 United States Code, Section 3553(a), that I have mentioned a
14 number of times and will continue to do so.

15 Those factors include, but are not limited to, the
16 nature and circumstances of the offense and the personal
17 history and characteristics of the defendant, because every
18 defendant must be considered individually as a person. Judges
19 are also required to consider the need for the sentence imposed
20 to reflect the seriousness of the offense, promote respect for
21 the law, provide just punishment for the offense, afford
22 adequate deterrence to criminal conduct, and avoid unwarranted
23 sentencing disparities, among other things.

24 First, I'm going to address, Mr. DeMaria, your
25 contention that Section 2251's 15-year mandatory minimum

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1 sentence constitutes cruel and unusual punishment in violation
2 of the Eighth Amendment. I disagree. The punishment will be
3 deemed cruel and unusual only when it is disproportionate to
4 the crime. That's a quote from the Graham case, 560 U.S. at
5 59. Constitutional proportionality is a narrow principle in
6 that it forbids only extreme sentences that are grossly
7 disproportionate to the crime. That's from the Harmelin case,
8 501 U.S. at 997.

9 In reviewing the proportionality of a sentence as
10 applied to a particular case, a Court must first consider
11 whether the gravity of the offense and the severity of the
12 sentence give rise to an inference of gross disproportionality.
13 That's from the Reingold case, 731 F.3d at 216.

14 There can be no question as to the seriousness of the
15 offense here. As the Second Circuit stated in Reingold,
16 Congress, courts and scholars all recognize that child
17 pornography crimes at their core demand the sexual exploitation
18 and abuse of children. Children are seriously harmed,
19 physically, emotionally and mentally in the process of
20 producing such pornography.

21 In the Ferber case, the Supreme Court noted that
22 severe criminal penalties for child pornography crimes is the
23 most expeditious, if not the only, practical method of
24 enforcing the law. 458 U.S. at 760.

25 Here, after the defendant's repeated urging, his

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1 11-year-old victim sent him pictures over the Internet,
2 including one of his genitals as well as a video of him
3 masturbating. During sexually explicit conversations with this
4 child, the defendant fully recognized the severity of his
5 conduct, remarking that he would go to jail if caught but that
6 11 is so "cute." That 11-year-old's mother tells us he is now
7 suicidal and that she is at a loss as to how to help him.

8 The defendant also induced a 14-year-old boy to engage
9 in oral and anal sex with him, which he did 10 to 20 times over
10 a yearlong period and, on at least one occasion, videotaped the
11 14-year-old engaging in oral sex and then distributed that
12 video on the Internet. The 14-year-old's grandmother said that
13 the defendant was like a brother to her grandson, someone she
14 had trusted but who betrayed them. At the time he had such
15 sexual contact with the 14-year-old, the defendant was aware of
16 the fact that he was HIV positive.

17 The defendant also had a collection of hundreds of
18 images of child pornography, including ones of prepubescent
19 children engaging in sexually explicit conduct. At the time of
20 his arrest, he admitted to having had sexual contact with at
21 least two boys since he was an adult, one he met at church and
22 the other at an afterschool program where he worked.

23 Balanced against the gravity of the defendant's
24 conduct, the severity of a 15-year sentence for the production
25 of child pornography simply doesn't render the mandatory

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1 minimum grossly disproportionate. This holding is consistent
2 with the numerous circuit courts of appeal that have similarly
3 rejected Eighth Amendment challenges to mandatory minimum
4 sentences in child pornography cases. See, for example, the
5 Ramos and Puglisi cases from the Second Circuit, the Heaton
6 case from the Eleventh Circuit, the Hart case from the Sixth
7 Circuit, the Malloy case from the Fourth Circuit, and the Polk
8 case from the First Circuit.

9 Indeed, the defendant himself rightly concedes that
10 appellate courts have consistently held that these mandatory
11 minimums do not violate the Eighth Amendment. That's from the
12 defendant's letter brief at 1.

13 The defendant's only specific arguments challenging
14 the mandatory minimum do not address this case law and do not
15 change the outcome in this case.

16 First, the defendant contends that the mandatory
17 minimum is unconstitutional because it eliminates the
18 sentencing judge's discretion. By that rationale, no mandatory
19 minimums would be constitutional, which is clearly not the law.
20 As the Supreme Court has stated, there can be no serious
21 contention that a sentence which is not otherwise cruel and
22 unusual becomes so simply because it's mandatory. That's from
23 the Harmelin case, 501 U.S. at 995.

24 Second, the defendant contends that the mandatory
25 minimum sentence is unconstitutional because he was repeatedly

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1 raped by a neighbor beginning at the age of 14. Although this
2 is undoubtedly a mitigating factor -- and I'm going to assume
3 the truth of that, the government doesn't contest it even
4 though it hasn't been able to corroborate it but I am going to
5 assume the truth of it -- although undoubtedly a mitigating
6 factor, which I will consider in sentencing, it does not render
7 the mandatory minimum grossly disproportionate to the
8 defendant's offense. See, for example, the Eleventh Circuit's
9 opinion in the Heaton case, 549 F. App'x at 835.

10 In sum, it is the Court's view, given the severity of
11 the defendant's conduct here, a sentence of 15 years in prison
12 is appropriate, whether mandatory or not, and does not violate
13 the Eighth Amendment.

14 The harder question, in my view, is whether a sentence
15 of 15 years is sufficient but not greater than necessary to
16 comply with the purposes of sentencing, as set forth in the
17 law, or whether a higher sentence in or closer to the
18 guidelines range is appropriate in this case.

19 This is an immeasurably difficult question. On the
20 one hand, I have a child predator before me, a man who sought
21 out children, both on the Internet and in real life, at church,
22 at an afterschool program that he worked at, and he abused
23 them. He enticed them to engage in sexual activity by
24 flattering, flirting and telling them he loved them, as he told
25 the 11-year-old, and then urging them to send graphic videos of

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1 themselves or making them himself. He not only contributed to
2 the child pornography market by collecting images of child
3 abuse for his own gratification, but he contributed to that
4 market with his own homemade pornography.

5 Finally, his conduct involved having anal sex with a
6 14-year-old boy at a time the defendant knew he was HIV
7 positive. I'll note that in the Weisser case, 417 F.3d at 352,
8 the Second Circuit stated that an upward departure would be
9 appropriate in a case in which a defendant had sexual activity
10 with a child while knowingly infected with HIV, although the
11 government is not seeking such a departure here and I am not
12 applying such a departure.

13 Defense counsel stated in his letter that the most
14 serious part of his crime was not so much the production of
15 child pornography but the sexual abuse of a minor. But
16 whichever conduct you look at as more or less serious or
17 egregious in this case, I can't think of many people who
18 present more of a danger to our society, and the most
19 vulnerable and defenseless of those in it, than this defendant.

20 On the other hand, I see before me a scared, young man
21 who looks not much older than a child himself. He was sexually
22 abused, he says, by a neighbor 20 years his senior, from the
23 age that he was 18 up until the time of his arrest. This man
24 also allegedly provided him with cocaine and marijuana, and, as
25 a result, the defendant now has substance abuse problems as

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1 well. He had no treatment for any of his prior diagnoses prior
2 to his arrest in this case.

3 I've considered all of the arguments counsel have
4 made. I've read all of the letters from family members. I see
5 how many people, Mr. Cardona, are here to support you because
6 they care about you. I did read those letters, and your family
7 members talk about you as humble and kind and loving and
8 reliable. And, of course, I considered the expert reports
9 submitted.

10 So, Mr. Cardona, please rise for the imposition of
11 sentence.

12 It's the judgment of this Court that you be committed
13 to the custody of the Bureau of Prisons for a term of 210
14 months, to be followed by a term of supervised release of ten
15 years. I believe that this sentence is sufficient but not
16 greater than necessary to comply with the purposes of
17 sentencing set forth in 18, United States Code, Section
18 3553(a).

19 You can be seated. I'm going to read the conditions
20 of your supervised release aloud.

21 All of the standard conditions of supervised release
22 shall apply. In addition, the mandatory conditions shall also
23 apply: The defendant shall not commit another federal, state
24 or local crime; shall not illegally possess a controlled
25 substance; shall not possess a firearm or destructive device;

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1 the mandatory drug testing condition is suspended due to the
2 imposition of a special condition requiring drug treatment and
3 testing; and the defendant shall cooperate in the collection of
4 DNA, as directed by the probation officer.

5 Ms. Castellano, can you please read the range of the
6 sex offender registration condition? And I am going to impose
7 that condition as well.

8 MS. CASTELLANO: Yes, your Honor.

9 The defendant shall register with the state sex
10 offender registration agency in any state where the defendant
11 resides, is employed, carries on a vocation, or is a student
12 and shall provide proof of registration to the probation
13 officer.

14 THE COURT: So that condition is also imposed.

15 In addition, I am going to follow the probation
16 department's recommendation with regard to the special
17 conditions, in light of the nature of the offense here:

18 First, the defendant is to report to the nearest
19 probation office within 72 hours of release from custody. That
20 would apply in any event. And he will be supervised in the
21 district of his residence. But, in addition, the defendant
22 will participate in a an outpatient treatment program approved
23 by the United States Probation Office, which program may
24 include testing to determine whether the defendant has reverted
25 to using drugs or alcohol. The defendant shall contribute to

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1 the costs of services rendered, based on the defendant's
2 ability to pay and the availability of third-party payments.
3 The Court authorizes the release of available drug treatment
4 evaluations and reports, including the presentence
5 investigation report, to the substance abuse treatment
6 provider, and this condition is being imposed in light of his
7 drug addiction.

8 The defendant shall also undergo a sex offense
9 specific evaluation and participate in an outpatient sex
10 offender treatment and/or outpatient mental health treatment
11 program, approved by the U.S. Probation Office. The defendant
12 shall abide by all rules, requirements and conditions of the
13 sex offender treatment program, including submission to
14 polygraph testing. The defendant shall waive his right of
15 confidentiality in any records for mental health assessment and
16 treatment imposed as a consequence of this judgment, to allow
17 the probation officer to review the defendant's course of
18 treatment and progress with a treatment provider. The
19 defendant shall contribute to the costs of services rendered
20 based on the defendant's ability to pay and the availability of
21 third-party payments. The Court authorizes the release of
22 available psychological and psychiatric evaluations and
23 reports, including the presentence investigation report, to the
24 sex offender treatment provider and/or mental health treatment
25 provider.

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1 The defendant shall participate in the computer
2 Internet monitoring program administered by the U.S. Probation
3 Office. The defendant must provide the U.S. Probation Office
4 advance notice of any computers, automated services or
5 connected devices that will be used during the term of
6 supervision and that can access the Internet.

7 The U.S. Probation Office is authorized to install any
8 application as necessary to survey all activity on computers or
9 connected devices owned or operated by the defendant. The
10 defendant may be required to pay the cost of monitoring
11 services at the monthly rate provided by the U.S. Probation
12 Office. The rate and payment schedule are subject to periodic
13 adjustments by the U.S. Probation Office.

14 The U.S. Probation Office shall be notified via
15 electronic transmission of impermissible, suspicious activity
16 or communications occurring on such computer or connected
17 device, consistent with the computer monitoring policy in
18 effect by the probation office.

19 As triggered by impermissible suspicious activity, the
20 defendant shall consent to and cooperate with unannounced
21 examinations of any computer equipment owned or used by the
22 defendant. This examination shall include, but is not limited
23 to, retrieval and copying of all data from the computer,
24 connected device, storage media and any internal or external
25 peripherals and may involve removal of such equipment for the

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1 purpose of conducting a more thorough inspection.

2 The defendant shall not have contact with any of the
3 victims in this case. That includes physical, written, visual
4 and telephonic contact with such persons. Additionally, the
5 defendant shall not directly cause or encourage anyone else to
6 have such contact with the victims.

7 The defendant shall not have deliberate contact with
8 any child under 18 years of age unless approved by the
9 probation office. The defendant shall not loiter within a
10 hundred feet of schoolyards, playgrounds, arcades or other
11 places primarily used by children under the age of 18.

12 He shall submit his person, residence, place of
13 business, vehicle and any property, computers, as defined in
14 18, United States Code, Section 1030(e)(1), electronic
15 communications, data storage devices and/or other media under
16 his control, to a search on the basis that the probation office
17 has a reasonable suspicion that contraband or evidence of a
18 violation of the conditions of his supervised release may be
19 found. The search must be conducted at a reasonable time and
20 in a reasonable manner. Failure to submit to such a search may
21 be grounds for revocation. He shall inform any other residents
22 that the premises may be subject to search pursuant to this
23 condition.

24 So those are the conditions of his supervised release.

25 I decline to impose a fine because the probation

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1 office has reported that he is unable to pay one.

2 I am required to impose the mandatory \$500 special
3 assessment, and I do so.

4 Let's talk about restitution for a moment.

5 Ms. Castellano?

6 MS. CASTELLANO: Your Honor, as I mentioned before,
7 the victim witness coordinator from this district and the
8 District of Guam are working with the victims or are in
9 contact, I should say, with the victims in this case. No
10 specific restitution requests have been received but I
11 understand that they may be forthcoming. So we will do our
12 best to receive those in the next week or two and to pass those
13 along to the Court and to defense counsel.

14 THE COURT: Any objection, Mr. DeMaria? Hold off on
15 imposing the restitution.

16 MR. DeMARIA: No, your Honor.

17 THE COURT: Is the government seeking forfeiture?

18 MS. CASTELLANO: No, your Honor.

19 THE COURT: So there will be no forfeiture. The
20 restitution order will be forthcoming.

21 Does either counsel know of any legal reason why this
22 sentence should not be imposed as stated, other than the ones
23 that you have previously articulated, Mr. DeMaria?

24 MS. CASTELLANO: No, your Honor.

25 MR. DeMARIA: No, your Honor.

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1 THE COURT: In terms of recommendations, I'll
2 recommend that he be put in a sex offender treatment program
3 while he's incarcerated. I assume that that would have
4 happened automatically. I saw reference to the RDAP program as
5 well, and I am happy to make that recommendation, Mr. DeMaria,
6 if you'd like me to do that.

7 MR. DeMARIA: Yes, your Honor, please. And if you
8 could recommend that he complete those programs at FMC Devens?
9 That's the closest facility with sex offender treatment to his
10 family in New York City.

11 THE COURT: All right, so I'll make that
12 recommendation. Of course it's up to the Bureau of Prisons but
13 I'll make that recommendation.

14 That is the sentence of this Court.

15 Mr. Cardona, you have a right to appeal your
16 conviction and sentence except to whatever extent you may have
17 validly waived that right as part of your plea agreement. If
18 you do choose to appeal, the notice of appeal must be filed
19 within 14 days of the judgment of conviction. If you are not
20 able to pay the cost of an appeal, you may apply for leave to
21 appeal in forma pauperis, which simply means that court costs,
22 such as filing fees, will be waived. If you request, the Clerk
23 of Court will prepare and file a notice of appeal on your
24 behalf.

25 This is a sad case all around. Mr. Cardona, I know

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1 that you have had a lot of harm done upon you in your young
2 life but you've also done a lot of harm on others. I know that
3 you have some really hard times ahead of you but you have an
4 incredibly supportive family and I am really hopeful that the
5 treatment that you will get while you're incarcerated and the
6 treatment you'll get on supervised release, I hope that will
7 help you move forward and lead a productive and law-abiding
8 life and I do wish you luck with that.

9 Are there any other applications?

10 MS. CASTELLANO: Not from the government, your Honor.

11 MR. DeMARIA: Yes, your Honor. Pursuant to Rule
12 38(b)(2) of the rules of criminal procedure, I'd ask the Court
13 to make a recommendation that Mr. Cardona remain in MDC
14 Brooklyn until the conclusion of his direct appeal so as to
15 assist counsel in preparing his appeal. I will note that
16 Mr. Cardona has been extremely involved thus far. Due to the
17 nature of his case, it's incredibly dangerous for him to have
18 any paperwork on his case with him in jail. Of course, people
19 who commit crimes like he did are targets in prison and so
20 every time he's wanted to look at a document, we have to meet
21 with him face to face. And we'd like to continue doing that
22 until the conclusion of his direct appeal. And, again, that
23 was rule 38(b)(2).

24 THE COURT: Does the government have a position on
25 that?

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1 MS. CASTELLANO: Your Honor, we don't. We understand,
2 as the Court had said previously, that it's the discretion of
3 the Bureau of Prisons where the defendant will be placed and
4 your Honor can make recommendations. Other than that we have
5 no position.

6 THE COURT: How long do you think it will take you to
7 do that, Mr. DeMaria, to work on the appeal?

8 MR. DeMARIA: I believe we need -- first of all, we
9 need to order the transcript. I assume that will take a couple
10 of weeks. Then to file his principal brief, I believe we
11 have --

12 THE COURT: You can get the transcript much quicker
13 than that, from today's proceeding.

14 MR. DeMARIA: So, in that case, your Honor, if we can
15 get it, let's say, in a week and then we submit his principal
16 brief in 90 days, the government will have 90 days to reply, I
17 believe, approximately. Then we file a reply brief 14 days
18 later, so approximately six to eight months, I would say.

19 THE COURT: I'm going to think about that and I will
20 reach out to the appropriate people so I can make a more
21 informed decision about that and then I will rule on that. I
22 don't think that that needs to be part of the sentencing today
23 but I'll consider that request.

24 MR. DeMARIA: Thank you, your Honor.

25 THE COURT: Anything else?

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1 MS. CASTELLANO: Not from the government, your Honor.

2 THE COURT: All right, thank you, all. We are
3 adjourned.

4 (Adjourned)

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